PUBLIC PROSECUTOR

v.

LEE SOON SIAN

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL TRIAL NO. 58-7-92 (90)]
31 JANUARY 1994

DANGEROUS DRUGS: Accused called to enter upon his defence - Accused giving evidence on oath - Whether defence of accused has rebutted the statutory presumptions under s. 37(d) & (da)(v) of the Dangerous Drugs Act 1952 on the balance of probabilities - Whether prosecution had proved its case beyond reasonable doubt.

The accused was charged with trafficking in raw opium, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The accused was acquitted and discharged without calling for his defence (See [1993] 2 CLJ 214). On appeal by the prosecution, the accused was called to enter upon his defence. The accused elected to give evidence on oath and the Court was called upon to decide whether the defence of the accused had rebutted the statutory presumptions raised against the accused under s. 37(d) & (da)(v) of the Act on a balance of probabilities.

Held:

[1] There were discrepencies between the evidence of the accused under oath and the cautioned statement. The accused saw it fit to rely on his cautioned statement but sought to testify and introduce evidence running counter to his cautioned statement. The accused's denial of certain portions of the cautioned statement were mere afterthoughts, when seen in the light of the evidence of the defence witness Chief Inspector Jude Pereira.

[2] The falsity of the cautioned statement was brought to the fore when the accused was grilled under cross-examination by the learned Deputy. After reviewing the totality of the evidence the Court was satisfied that the accused had possession of and was paid to traffick the 16.735 kilogrammes of raw opium on the date and time in question as per the charge.

[3] The accused had not rebutted the statutory presumptions on the balance of probabilities and the prosecution had proved its case beyond reasonable doubt.

[Accused found guilty and sentenced to death].

Cases referred to:

Public Prosecutor v. Lee Soon Sian [1993] 2 CLJ 214 ***(refd)***

Public Prosecutor v. Adetunji Adeleye Sule [1993] 3 CLJ 113 / [1993] 1 AMR 24 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da)(v), 39B(1)(a), (2)

For the public prosecutor - Zulkifli Bakar, DPP
For the accused - Faisal bin Mohd. Hanafiah

JUDGMENT

Haji Abdul Malik Bin Haji Ishak JC:

The Supreme Court ordered the defence of the accused to be called for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) ("the Act") and punishable under s. 39B(2) of the Act. I have since called the accused to enter his defence and he elected to give evidence on oath and called Chief Inspector Jude Pereira as his witness.

It is germane, at this juncture, to state that I need to consider whether the defence has rebutted the presumptions under ss. 37(d) and 37(da)(v) of the Act on the balance of probabilities.

In his defence, the accused narrated the events leading to his arrest. He testified that on 12 February 1990 at 12.00 p.m. he received a telephone call from his friend by the name of Ah Hoong who enquired as to whether he (the accused) was free on the next day (i.e. 13 February 1990). He told Ah Hoong that he was free whereupon Ah Hoong requested him to bring the "barang" to Ipoh. He agreed to Ah Hoong's suggestion.

According to the accused, Ah Hoong told him over the telephone that the "barang" would not be delivered to his (the accused's) house but would be sent to a deserted empty house near a disused mining pool where they used to fish together. The accused enquired as to why the "barang" could not be sent to his (the accused's) house. Ah Hoong explained that he was afraid that the accused might not be in and that was why he decided to send the "barang" to the deserted empty house. Ah Hoong also told the accused that there would be cash to the tune of RM1,500 wrapped in a Chinese newspaper at the deserted empty house. Ah Hoong requested the accused to collect the "barang" on 13 February 1990 at 3.00 p.m.

According to the accused, two weeks before the Chinese New Year, Ah Hoong paid him a visit. It was during this occasion that the accused wanted to borrow RM1,500 to help his ailing mother. However, Ah Hoong only advanced RM50 to the accused as he was short of money then.

The accused admitted that prior to 12 February 1990, he knew of the existence of the deserted empty house since he used to fish in that vicinity.

In the course of the telephone conversation with Ah Hoong on 12 February 1990, the accused suspected that the "barang" was dadah. This was relayed to Ah Hoong who in turn assured the accused that that "barang" was not dadah and that it was meant for his (Ah Hoong's) friend. Ah Hoong requested the accused to deliver the "barang" to the bus station at Ipoh in particular to leave the "barang" near the bicycle stand.

The accused explained that he knew Ah Hoong for 6 years but he did not know the exact name of Ah Hoong. For the duration of 6 years, each time the accused went to Kuala Lumpur he would meet Ah Hoong. And after the Taiping High Court had initially released him, the accused testified that he was placed under PCO and it was during this occasion that he proceeded to Kuala Lumpur to locate Ah Hoong but failed to do so. Now, the accused says that he does not know the whereabouts of Ah Hoong. And that Ah Hoong is not in Court.

Adverting to the episode on 13 February 1990, this was what the accused said.

He testified that he proceeded on motorcycle ABE 8159 which he borrowed from Ah Woon to go to the deserted empty house at the disused mining pool on 13 February 1990 at 3.00 p.m. alone. He used the kampong road for two reasons. Firstly, he had no licence. Secondly, he did not put on his crash helmet. He testified that from the previous trial he realised that the owner of motorcycle ABE 8159 is Tai Yin Kooi (SP3), the father of Ah Woon. He used to ply along the kampong road each time he wanted to go fishing at the disused mining pool. He described the bad condition of the kampong road and that he had to look to the left and to the right to manoeuvre the motorcycle; that the area was overgrown with trees, lallang and ubi kayu trees; that he did not know the exact location of the deserted empty house. He further testified that when he went fishing at the disused mining pool then, the area was not overgrown with trees and he could easily see the roof of the deserted empty house. But on the day of the incident, there were many trees and he could not see the roof of the deserted empty house. He rode the motorcycle slowly and finally managed to locate the deserted empty house. He discovered that the door of the deserted empty house was not closed and there he saw a wooden drum and dried grass. He saw the "barang" on the ground. He pushed the "barang" aside. There was a box wrapped with a blue coloured paper. He carried the box and discovered that it was very heavy (sangat berat) and he put the box on the ground. He then proceeded to open a package wrapped with Chinese newspaper and found some cash but he did not count them and, instead, he put the package containing the money into his pocket. He then carried the "bungkusan biru" and placed it in front of the motorcycle ABE 8159. To be precise, he placed the "bungkusan biru" on the carrier of the motorcycle. He emphasised that the "bungkusan" was the "bungkusan kertas biru" and not the "bungkusan kain biru". He described the size of the "bungkusan kertas biru" to be 16 cm by 24 cm and its thickness to be 3 inches. He denied that exhibit P3B (beg kain berwarna biru) was the item he referred to when he described the size of the "bungkusan kertas biru". He testified that the "bungkusan kertas biru" was not produced in the previous trial at the High Court, Taiping. He further testified that at the deserted empty house he did not see exhibit P3B. He testified that what Busra testified especially that part that he carried exhibit P3B on motorcycle ABE 8159 was not true.

The accused continued his evidence as follows.

After he had placed the "bungkusan kertas biru" on the motorcycle, he then proceeded home. On his way home, the police arrested him. He testified that after his arrest, he was blindfolded. Again he denied carrying exhibit P3B with its contents (P7A to P7J) on the motorcycle (P10). He denied witnessing the police unfolding the mouth of the blue cloth bag (P3B), which was folded, at the scene.

The accused narrated that after he was blindfolded he was taken inside a van and that van moved for some 15 minutes before it stopped. He was then made to alight from the van and was

directed to climb a flight of stairs and then he was made to sit on something. About 20 minutes later, his blindfold was opened and he saw on the table, in front of him, several packages black and white in colour (he did not count them) resembling the packages in photographs P8G and P8H but not like P7H (bungkusan plastik dan kertas bertanda "Z8" bersama raw opium). He again denied carrying the exhibits as shown in photographs P8G and P8H on the carrier of the motorcycle. He did not know what happened to the "bungkusan biru" which he carried on the carrier of the motorcycle. He stated that after his arrest he was not shown the "bungkusan biru" by the police. He identified the place of his arrest as shown in photograph P8D at p. 140 of the appeal record. He testified that he was assaulted by a long haired male Malay and he injured his head. From the scene, he was then brought home. Thereafter, he was taken to Sungai Siput police station.

He admitted making a cautioned statement (D15 - the carbon copy of the cautioned statement) on 14 February 1990 at 11.40 a.m. He testified that after he had given his cautioned statement (D15) he inadvertently saw the exhibits as shown in photographs P8G and P8H. After the cautioned statement (D15) was translated to him by the Court interpreter, the accused admitted his signatures found therein and confirmed that that was truly the cautioned statement which he had made.

Under cross-examination by the learned Deputy Public Prosecutor, the accused suprisingly denied two portions of the cautioned statement particularly at p. 3 lines 19 to 23 and at p. 4 lines 60 to 61, the relevant portions being:

> Beliau bertanya kepada saya, adakah saya hendak pakai wang. Saya bagitahu saya hendak, kemudian dia suroh saya buat sedikit kerja - p. 3 paras 19 to 23 of the cautioned statement.
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> Mereka merampas bungkusan biru tersebut serta menangkap saya... - p. 4 para 60 to 61 of the cautioned statement.

Under the strain of cross-examination, the accused buckled to the ground. He stated that he did not tell Chief Inspector Jude Pereira in his cautioned statement in regard to the money that was meant for the fare ("wang tersebut adalah diberikan kepada saya sebagai tambang kereta" p. 4 lines 34 & 35 of the cautioned statement) nor did he say that he was shown the contents of the exhibits ("... Saya kemudian ditunjukkan kandungan itu dan saya difahamkan oleh seorang anggota polis bahawa itu adalah dadah candu" p. 4 line 64 to p. 5 line 3 of the cautioned statement). He strenously denied transporting exhibit P3B (beg kain berwarna biru) and its contents (P7A to P7J) on the carrier of the motorcycle that fateful day. He was adamant that he carried a box wrapped with blue paper (kotak dibungkus dengan kertas biru) and that box was not produced by the prosecution in the course of the trial. He testified that he first saw exhibit P3B in Court during the previous trial. He described the scene of the arrest as noisy with a lot of people working there.

He sought to explain, under re-examination, that he used the words "bungkusan biru" in his cautioned statement as the recorder and the interpreter asked him as to whether the "bungkusan biru" belonged to him. Thus, by force of circumstances, he had to use such words.

The next witness for the defence was Chief Inspector Jude Pereira (SB2) who confirmed recording the cautioned statement of the accused with the assistance of Detective Sergeant 4116 Lim Boon Leong as an interpreter. The original copy of the cautioned statement (D15A) was tendered through this witness. The witness, when questioned as to the contents of the cautioned statement particularly those paragraphs disputed by the accused, categorically stated that he wrote whatever the accused said through the interpreter.

Having deliberated on the defence at great length and mindful that the defence need only rebut the presumptions on the balance of probabilities, I have asked myself this pertinent question: Is the defence reasonable and probable? On proper assessment of the evidence, it is unreasonable and improbable that the accused did not know of the offending drugs in the "beg kain berwarna biru" (P3B) with its contents (P7A to P7J) placed across the carrier of the motorcycle that fateful day.

The prosecution witnesses particularly Busra and Muld (see the recital of the facts reported in [1993] 2 CLJ 214) saw the accused transporting P3B with its offending contents (P7A to P7J) on the motorcycle at the scene. The accused, in his defence under oath, denied transporting P3B

containing P7A to P7J and instead testified that he merely carried on the carrier of the motorcycle a box wrapped with a blue coloured paper (kotak yang dibungkus dengan kertas warna biru). The accused even went to the extent of alleging that that box was never produced by the prosecution in the course of the trial. This denial runs counter to the cautioned statement of the accused (D15 and D15A). In his cautioned statement, references were made by the accused in regard to "bungkusan biru" referring to no other than P3B and its contents (P7A to P7J). Such a defence seems to allege that the prosecution fabricated evidence against the accused purposely to put him in trouble. But the amount of raw opium is huge, 16.735 kilogrammes (see P7A to P7J and photographs P8G and P8H). 1,000 grammes of raw opium would be sufficient to attract the presumption under s. 37(da)(v) of the Act. Surely the police in Malaysia would not have waylaid the accused whlie happily riding his motorcycle on that stretch of the road and go to such an extreme to put him in trouble.

There were discrepancies between the evidence of the accused under oath and the cautioned statement. The accused saw it fit to rely on his cautioned statement but sought to testify and introduce evidence running counter to his cautioned statement. This was obviously a perilous course to take. The accused denied certain portions of the cautioned statement as stated in the early part of this judgment and when seen with the evidence of Chief Inspector Jude Pereira (SB2), the defence witness, those denials were nothing but mere afterthoughts.

The accused testified that he wanted to borrow a sum of RM1,500 from Ah Hoong for his ailing mother and Ah Hoong could only provide him wlth RM50. If this was true, why must Ah Hoong suggest to the accused over the telephone to collect the balance of the money at the deserted empty house? (there was no evidence who put the money and the "barang" there). Surely no prudent man would want to leave the money, RM1,394 (P13) in the deserted empty house and risk the danger of losing it. This aspect of borrowing money from Ah Hoong was not supported by the cautioned statement made hardly one day after his arrest. The cautioned statement spoke of the money that was meant for his fare. When the accused realised his mistake he resiled and, under cross-examination, stated that this aspect was not stated by him in his cautioned statement. Incidentally, since the "barang" was destined to go to Ipoh, why must the "barang" be sent to the deserted empty house bearing in mind that Ah Hoong spoke to the accused over the telephone when he was in Kampar. Would it not be nearer to send the "barang" to Ipoh from Kampar rather than from Kampar to the deserted empty house?

The accused testified that the owner of motorcycle ABE 8159 is non-other than Tan Yin Kooi, the father of Ah Woon. And at the scene, according to the accused, there were a number of people there; the crowd was boisterous so to speak. And after the arrest of the accused, five motorcycles and motorcars (the number unknown) arrived at the scene. The accused was blindfolded and, subsequently, it was alleged that a long haired male Malay assaulted him. From the scene the accused was then taken to his house. Unfortunately, all these set of facts were not put across to the prosecution witnesses and they can safely be considered to be mere afterthoughts. Even the cautioned statement is devoid of such set of facts.

The accused had more than ample opportunity to prepare his defence. He had a golden opportunity to make use of his cautioned statement as the foundation of his defence. But alas he did not utilise that golden opportunity to his benefit. On this point, Edgar Joseph Jr. SCJ in *Public Prosecutor v. Adetunji Adeleye Sule* [1993] 1 AMR 24 p. 991 especially at p. 996, had this to say:

> Having said that, we would add that if, and when, the respondent gives evidence to the same effect as his cautioned statement, he is entitled to take advantage of it and to point out that it is consistent with his evidence.

One other point merits mention. Fingerprints could not be lifted from the ten packages (P7A to P7J) and the blue cloth bag (P3B) and this must be viewed in the context of the evidence of the prosecution and that of the defence. The prosecution alleged that the accused carried the blue cloth bag (P3B) and its contents (P7A to P7J) across the carrier of the motorcycle. The accused in his defence denied this but in his cautioned statement admitted that he put the "bungkusan berwarna biru itu dan meletakkannya atas motosikal" (though he sought to explain in his defence that he was forced by circumstances to use the words "bungkusan biru"). Now, looking at the blue cloth bag (P3B) and the ten packages (P7A to P7J), the absence of fingerprints on

them are not surprising and such absence cannot *per se* exculpate the accused from liability. In my judgment, the totality of the evidence point conclusively to the fact that the accused carried the blue cloth bag with its incriminating contents as explained by Busra and Muid notwithstanding the absence of fingerprints on them.

In my judgment, the falsity of the cautioned statement was brought to the fore when the accused was grilled under cross-examination by the learned Deputy. It is my finding of fact, after dutifully reviewing the totality of the evidence both from the prosecution and the defence, that the accused had possession and was paid to traffick in dangerous drugs, to wit, 16.735 kilogrammes of raw opium on the date and time in question as per the charge. For the reasons adumbrated above, the accused had not rebutted the aforesaid statutory presumptions on the balance of probabilities. Consequently, the prosecution had proved its case beyond reasonable doubt and I found the accused guilty of the offence for which he was charged and convicted him. I sentenced him to death.

PUBLIC PROSECUTOR

v.

SAUYAH BTE MATASAM & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL TRIAL NO. T(47) - 24 OF 1993]
26 MARCH 1994

DANGEROUS DRUGS: Charge under s. 39B(1)(a) Dangerous Drugs Act 1952 - Whether accused had rebutted the statutory presumptions of knowledge and trafficking under the Act - Age of accused - Whether accused could be sentenced to death.

EVIDENCE: Evidence of age - Whether there was sufficient evidence to show that accused was 18 years old at the time of commission of the offence.

The accused, Sauyah, was charged under s. 39B(1)(a) of the Dangerous Drugs Act (Revised 1983), of trafficking in 822.7g of cannabis, which was amended by the Court to read 92.7g as the chemist only tested this amount to confirm that the substance was cannabis.

Sauyah had been searched when she disembarked from a boat in Lahad Datu, Sabah. Two packages of dried leaves (cannabis) were found in her handbag. In the police station she was body searched. A package was found tucked in between her belly and the waist band of the trousers she had on. Her inside trouser legs had also been stitched to form compartments which contained 2 more packages. Sauyah wore a sarong to conceal the compartments.

Sauyah admitted to carrying the packages in her handbag and stitched compartments but denied the one in her waistband. She claimed a man had handed her the packages in Philippines to be delivered in Kota Kinabalu. She denied knowledge that the dried leaves were cannabis. She also claimed to have informed the police who searched her about the packages in her trouser legs.

Held:

[1] Although there is nothing in the accused's' demeanour to suggest she is lying in Court, this does not automatically mean she is telling the truth. The accused's own testimony that she informed the police about the packages in her trouser legs and handbag creates suspicion as